Nos. 14990 - 14991 - 14992

In the

United States Court of Appeals

For the Ninth Circuit

REYNOLDS METALS COMPANY, *Appellant*, vs. PAULA MARTIN, by and through Arthur H. Lewis, her guardian ad litem, *Appellee*.	No. 14990
REYNOLDS METALS COMPANY, *Appellant*, vs. VERLA MARTIN, *Appellee*.	No. 14991
REYNOLDS METALS COMPANY, *Appellant*, vs. PAUL MARTIN, *Appellee*.	No. 14992

Petition for Rehearing en Banc

Appeal from Final Judgments of the District Court
for the District of Oregon

HONORABLE WILLIAM G. EAST, JUDGE

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To the United States Court of Appeals for the
Ninth Circuit and the Judges thereof

Comes now Reynolds Metals Company, a corporation, appellant in the above-entitled causes, and presents this, its petition for a rehearing en banc of the

above-entitled causes, and, in support thereof, respectfully shows:

I

The far-reaching effects on basic industry throughout the country of the unprecedented liability imposed in these cases makes rehearing by the entire court imperative.

The decision of this court in these cases has imposed on appellant a liability so unprecedented and so certain to produce the severest repercussions on the conduct of hitherto lawful industry everywhere that appellant deems it imperative to call to the attention of this court the manifest injustice which it feels has been done.

This court in effect ruled that the operation of an aluminum-reduction plant — an operation similar to any one of several other vital industrial processes in which fluorides escape, such as steel plants and fertilizer plants—rendered the operator absolutely liable for the assorted ailments of the surrounding population, even though the operator took every conceivable precaution against injuring anyone and in fact reduced the amount of fluorides escaping far beyond the point where they were ever capable of harming residents in the area near the plant. Those who wish to do so can interpret the decision as laying at the feet of these

fluoride-producing industries the sole responsibility for the indigestion, backaches, excess weight and other commonplace ailments of those who live near their plants, whether the plants are shown to endanger those persons or not. The burden which could be thus imposed on a lawful industry is staggering.

It is not as though appellant had simply gone ahead, indifferent to the problems of its neighbors. On the contrary, it has made its Troutdale plant an outstanding example of effective fume control. Before appellant took over in 1946, the plant had been operated for three years (1942-1945) without any fume controls at all. Even then there were no complaints of injury to residents. Still, because of a possible hazard to cattle feeding on the surrounding forage, appellant did not begin operation until it had installed in the plant the then best developed fume-control system. A few weeks later, in late 1946 or early 1947, the system was supplemented. Only months after that project was completed, in early 1948, a whole new system was designed, and units of the new system were put into operation progressively as each one was completed. The present system alone cost over $2,000,000 to install, and in 1950 it cost over $129,000 just to operate it. Each improvement had to be especially designed and constructed, for these systems were unique and there was no ready-made equipment available.

This court has taken this evidence of four years of persistent effort and tremendous expense and relied on it as evidence of negligence by erroneously stating that appellant did nothing to improve its controls until 1950 and by finding "no showing" that all of it could not have been done earlier. The court has inferred the existence of a "serious" toxic threat to *humans* from the simple fact that appellant ran tests to determine whether or not there was any problem with respect to *cattle* pastured in the area.

Appellant would have been far better off if it had been a laggard instead of a pioneer, if it had saved its efforts and done absolutely nothing about testing or fume control. As it stands now, appellant has been given the burden of showing that its efforts could not have been more intense; appellees have not been required to show that anything more *could* have been done. If appellant had done nothing at all, at least its own evidence of diligence could not have been used against it.

It is also ironic that the court should find the operation of an aluminum-reduction plant inherently dangerous in this case, where appellant proved that it had in fact succeeded in reducing fluorine emanations far beyond the point where they were dangerous to humans. There is no dispute that fluorine, like its chemical

cousin, iodine, is *not* toxic, unless it is ingested *in excessive concentrations*. Small concentrations are not only harmless, but beneficial. Over 15,000,000 Americans in at least 840 communities are drinking water to which fluorine has been added. The Oregon court has found that the introduction of one part of fluorine per million parts of water reduces dental decay among 12- to 14-year-old children 60 to 65 per cent, while doing no harm to anyone. The court cited cases in other jurisdictions unanimously reaching the same conclusions.

Baer v. City of Bend (1956) 206 Or. 221, 223-224, 292 P.2d 134, 135

It cited with approval the following findings of the Ohio court (206 Or. 224, 292 P.2d 135):

Kraus v. City of Cleveland (Ct. Com. Pleas, Ohio, 1953) 116 N.E. 2d 779, 792-793; aff'd (1955) 163 Ohio St. 559, 127 N.E. 2d 609

> "To further crystallize the question of the meaning of the word 'toxicity' as it relates to the use of fluorides certain other items of evidence established in this record should be noted. Millions of people in the United States have been drinking water containing natural fluorides for years and years, with no positive proof of any systematic toxic effect. The amounts of fluorine concentration in some of these localities runs 5, 8 to 14 times the amount intended

for use here as to optimum amount of 1 part per million. * * *

"The evidence discloses that only when fluoride content of water supply exceeds 5 or 6 parts per million will prolonged usage give rise to detectable osseous changes and then only in the most susceptible persons. (Heyroth.) The margin of safety is so wide that there is little danger of pathologic or toxic effects. * * *

"No evidence has ever been produced that drinking water containing one part per million has or will harm any living person or thing."

One part per million equals one milligram per liter, and a liter is 1.0567 quarts. Therefore, every one of those 15,000,000 persons who drinks or ingests in any form a quart of water a day takes in a milligram of fluorine. This is the amount the courts have universally held harmless and beneficial.

The undisputed evidence was that the appellees could have been exposed, at the very greatest, to substantially less than one milligram of fluorine per day. This court has thus found to be "poisonous" an amount of fluorine which scientific and judicial opinion has unanimously found harmless heretofore.

The effect of this court's decision is far more serious than that, however. In effect, it has said that it will not *consider* the concentrations of fluorine escaping; the

appellant is simply liable if its plant emits any fluorine at all. But aluminum simply cannot be produced without giving off *some* fluorides, and the same is true of many other vital industries. As this court has chosen to disregard efforts to reduce the emanations far beyond the danger point, the moral of its decision is clear: The aluminum industry has been judicially branded a permanent menace, whether or not it is one in fact.

Appellant conceives the impact of this decision to be so tremendous that it should be reconsidered to correct what are submitted to be serious errors of law contained therein.

It is impossible to reconcile the decision in the cases at bar with the recent decision of another division of this court as to the basis of liability of an operator of an aluminum-reduction plant for injuries resulting from such operations.

> *Albert A. Arvidson, et al, v. Reynolds Metals Company* (W.D. Wash., S.D., 1954) 125 F. Supp. 481, affirmed per curiam (CA 9, 1956) 236 F.2d 224, cert. den. (1957) — U. S. —, 1 L.Ed.2d 323

Here another division of this court in effect rejected the doctrine of absolute liability and affirmed *per curiam* the opinion of the lower court which recognized the utility of the industry and weighed the *actual* risk involved. Judge Boldt said (p. 488):

> "It should be clear from the findings of fact and comments thereon previously made herein that the view of the evidence taken by the court does not warrant a finding that the operation of defendant's plants and resulting effluence therefrom constitutes an unreasonable interference with plaintiffs' use and enjoyment of their lands. The court is fully satisfied that the utility of defendant's plant operations and their importance to the economy and security of the nation far outweigh any injury to plaintiffs shown by the evidence."

It is respectfully submitted that the reasoning of that case cannot be reconciled with the wholly different approach taken by this court in these cases. Therefore, it is imperative that the entire bench be convened to put the conflict to rest, to weigh the social and economic consequences flowing from the position heretofore taken by this division in these cases, and to decide unequivocally what shall be the future of the aluminum industry in the area within the bounds of this circuit.

Appellant undertakes to suggest briefly what it considers the most vital errors of law embodied in the opinion of this court.

II

This court imposed upon appellant the burden of proving itself not negligent, and then misstated the evidence appellant introduced.

Throughout the history of the common law, it has been axiomatic that the plaintiff has the burden of proving the defendant negligent. This is the law both in Oregon and in the federal courts:

Pennsylvania Railroad Company v. Chamberlain (1933) 288 U.S. 333, 77 L. Ed. 819

Shewmaker v. Capital Transit Co. (C.A. D.C., 1944) 143 F.2d 142

Schweiger v. Solbeck (1951) 191 Or. 454, 230 P.2d 195

Waller v. N. P. Ter. Co. of Oregon (1946) 178 Or. 274, 166 P.2d 488

Horn v. National Hospital Association (1942) 169 Or. 654, 131 P.2d 455

That means that the plaintiff must show some respect in which the defendant failed to exercise reasonable care. This court in its decision did not point to any evidence introduced by appellees to sustain this burden, and there is none in the record. This fatal omission was glossed over by thrusting the burden of proof on the appellant. The court said:

> "Further supporting the contention of negligence is the fact that not until the summer of 1950,

did Metals Co. seek the additional control of the escape of the gases. It then expended upwards of $2,000,000 by which it reduced the gas escape to all but 10% of the amount created. *There is no showing that this reduction of 90% of the poisons released could not have been done at a much earlier date.*" (Emphasis added)

Appellant moved for a directed verdict at the end of plaintiffs' evidence on the ground, among others, that no evidence of negligence had been introduced (R. 957-958). It appealed the denial of the motion (Appellant's Brief, p. 8). The case should have ended there, for it was then irrelevant what appellant could or could not prove; appellees had not made a *prima facie* case. What this court should have said was this: There is no showing by appellees that this reduction of 90 per cent of the fluorides released *could* have been done any earlier.

Furthermore, this court ignored the undisputed evidence. It stated that "not until the summer of 1950" did appellant do anything about supplementing the original controls. The record shows this: In September, 1946, appellant began to operate the Troutdale plant, with the original fume-control system installed. About the end of 1946, appellant began to supplement the system by the installation of the baffles described in Appel-

lant's Brief, p. 15. Installation was completed in the late summer or fall of 1947. Early in 1948, appellant began construction of the pilot plant of the present fume-control system. Although this system was not entirely finished until November, 1950, installation of the whole system was begun in 1949, and portions were put into operation progressively as they were constructed (Appellant's Brief, p. 16).

It must be remembered that each of these improvements had to be designed, tested and constructed wholly new, for there were no ready-made controls available. Under these circumstances, the continued attempt to find better controls was carried on at optimum speed. One set was hardly in operation before the next improvement was being designed. In a case involving the emission of fumes from a sulphuric-acid plant, the Missouri court has negatived any suggestion of negligence under these circumstances.

Kelley v. National Lead Co. (Mo. App., 1948) 210 S.W. 2d 728, 734, 735

> "The question of whether defendant was guilt (sic) of negligence in failing to install a Cottrell Precipitator so as to prevent the escape of fumes and gases is not unlike that which arises where a defendant is called upon to answer for its nonobservance of a statutory duty to place a guard upon a dangerous machine. Such a duty is absolute whenever it is possible for the machine to be guarded; and if, in such a case, it appears that there was a guard or

safety device known and obtainable which would have served the purpose contemplated by the statute, the failure of the defendant to guard its machine with such device will in that event give rise to actionable negligence. *Simon v. St. Louis Brass Mfg. Co.*, 298 Mo. 70, 250 S.W. 74. On the other hand, if there is no such device known and obtainable, the defendant cannot be held guilty of negligence in failing to install it.

"* * * If a Cottrell Precipitator had been readily procurable on the market, defendant would no doubt have owed plaintiffs the duty of promptly installing one, but since such a device was not available on the market, defendant was not guilty of any breach of duty so as to have afforded plaintiffs a remedy by an action for negligence."

Appellant is not unaware that these cases were submitted to the jury with the understanding that appellees would have the benefit of the inference raised by *res ipsa loquitur*. This court, however, did not decide on that basis. It did decide that, assuming the doctrine applied, the court's instruction was not a misstatement of the doctrine's effect. It failed entirely to consider whether the doctrine should have been applied at all, in the circumstances of these cases, to save appellees from being nonsuited (see Appellant's Brief, pp. 26-32).

Thus this court has held appellant liable for negligence although appellees have introduced no evidence to prove it and appellant's undisputed evidence points the other way.

III

This court has branded the making of aluminum an inherently dangerous activity in all circumstances, regardless of whether it is in fact dangerous.

In its application of the rule of *Fletcher v. Rylands*, this court has said in effect that the making of aluminum is an inherently dangerous activity, without regard to the amount of fluorides released. The rule would apparently apply even to a plant which emitted only one pound of fluoride per day. This result was reached despite the fact that the activity is dangerous only if the concentrations of fluoride given off are large enough to be toxic. If the concentrations are below the toxic level, there is no danger at all.

The making of aluminum does not fall within the definition of ultra-hazardous activity adopted by the Restatement and approved by the Oregon court.

Bedell v. Goulter (1953) 199 Or. 344, 353, 261 P.2d 842, 846

"§ 520. 'DEFINITION OF ULTRAHAZARDOUS ACTIVITY.

" 'An activity is ultrahazardous if it

" '(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and

" '(b) is not a matter of common usage'."

By the exercise of care, any risk to residents surrounding an aluminum plant *can* be eliminated. Appellant believes it *has* eliminated it. When the 1946 fume-control system was in operation, appellees were exposed to less fluorine than they might have consumed regularly by drinking fluoridated water. The later fume controls have reduced the escaping fluorides drastically beyond that point. There is no showing that any risk to the health of surrounding residents remains.

The situation is not analogous to the keeping of a wild beast. Appellant has tamed the fluorides and muzzled them to boot. Nor are cases involving blasting or the storage of water in point. There is no certain way of controlling an explosion or preventing underground percolation of water. But it is scientifically certain that if the concentrations of fluoride are sufficiently reduced, below the point where they can possibly be toxic, there is no risk remaining.

Whether an activity is ultrahazardous is a question of fact for the trial judge to determine.

3 Restatement of Torts, Section 520, Comment h, p. 47

Luthringer v. Moore (1948) 31 Cal. 2d 489, 190 P.2d 1, 5

In this case, Judge East emphatically refused so to find, stating that appellant "is engaged in a perfectly

legal use of its property, conducting thereon a recognized industry, namely, an aluminum reduction plant."

Martin v. Reynolds Metals Company (D. Or. 1955) 135 F. Supp. 379, 380

This court has overturned that determination on appeal. A finding of fact by a judge sitting without a jury may be overturned only if it is clearly erroneous.

Federal Rules of Civil Procedure, Rule 52 (a)

No circumstances appear in the record before this court which justify altering the course set by the *Arvidson* case and the finding of the trial judge in these cases.

IV

This court has emasculated federal discovery procedure in all personal injury cases by its decision that appellees did not waive their doctor-patient privilege.

Appellees Paul and Verla Martin answered, without objection, written interrogatories and questions on the taking of their depositions which revealed their physical condition and their consultations with numerous physicians relating thereto. This court has ruled that in neither case did appellees waive their privilege, because they did not "offer" themselves as witnesses; they remained appellant's witnesses.

The striking fact is that of necessity this will be true in every personal injury action. By definition, the interrogatories are propounded by the defendant, and it will invariably be the defendant who wants to take the plaintiff's deposition. In effect, therefore, this court has ruled that a plaintiff in a personal injury action can never waive this privilege in the course of the normal discovery procedure preceding trial.

The court seems to recognize that the plaintiff may later waive the privilege by taking the witness stand in his own behalf and testifying to his injuries. Appellees Paul and Verla Martin did that in these cases (R. 673-674, 811), and of course they called several of their doctors to testify. But of what value is the waiver to the defendant at that late date? He is already in the midst of the trial, and the time for discovering what the physicians diagnosed is past. If waiver must wait until that time, the whole purpose of the federal discovery procedure has been defeated; the defendant has been prevented from ascertaining important, possibly crucial, information which would enable him to prepare his case, to narrow issues at trial, or to take a more realistic position in efforts to negotiate a settlement.

There is no principle of law which compels this unjust result. The privilege is designed to protect the patient's privacy by prohibiting public reference to his

physical condition. But this condition need no longer be kept secret when the patient himself has voluntarily made it public. The essence of the waiver is the voluntary disclosure, and this disclosure is just as complete and just as voluntary when the plaintiff is the defendant's witness as when he is his own. In the *Forrest* case, referred to in the court's opinion, the Oregon court held that the privilege is waived if the patient "of his own accord shall withdraw the privileged veil of privacy." (See Appellant's Brief, p. 68) It did not rely on the plaintiff's becoming her own witness at trial.

This point has been settled in a federal case indistinguishable from the cases at bar. There the plaintiff, in answering interrogatories, revealed a condition of mental disease. Later she objected when defendant sought the records of an institution in which she had been confined. The court held her privilege waived.

Munzer v. Swedish American Line (S.D. N.Y. 1940) 35 F. Supp. 493, 497, 498

> "Plaintiff made no objection to any of the interrogatories. Her answers to the interrogatories were voluntary. Under Rule 33 she could have presented her objections to the Court within ten days after service of the interrogatories and raised the issue of 'privilege' by such objection. It has been generally recognized that 'privilege' as an objection applies to interrogatories under Rule 33, just as it may be the basis of an objection to questions on the examination of a party whose deposition is being taken under

Rule 26. * * * The scope of interrogatories under Rule 33 is as broad as the scope of examination by deposition, as provided in Rule 26(b), which permits an examination 'regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.' * * *

"I think that here the plaintiff has waived her privilege so far as it relates to communications with physicians concerning her mental condition. * * * Here it is entirely clear that plaintiff has many times over disclosed to the public through her answers to the interrogatories in this case the fact that she was at one time insane. The fact of her insanity is no longer a secret and she cannot now attempt to clothe communications regarding her prior mental conditions with the privilege granted by Section 352 of the New York Civil Practice Act."

CONCLUSION

WHEREFORE, In light of the vital importance to industry in general of the issues here presented, the serious errors of law which appellant believes to have been committed, and the essential conflict of the views expressed in these cases with views previously adopted by this court, appellant respectfully urges that this petition for rehearing en banc be granted and that upon further consideration the judgments below be reversed.

Appellant feels certain that this court shares the views of the Oregon court, which has said:

Malloy v. Marshall-Wells Hardware Co. (1918) 90 Or. 303, 334-335, 175 Pac. 659, 661

"the high office of the court 'is never so dignified as when it sees its errors and corrects them'."

Respectfully submitted,

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I, FREDRIC A. YERKE, JR., of counsel for the above-named appellant, do hereby certify that in my judgment the foregoing petition for a rehearing en banc of these causes is well founded, is presented in good faith, and is not interposed for the purpose of delay.

FREDRIC A. YERKE, JR.
Of Counsel for Appellant